



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2013

Ms. Danielle R. Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-14088

Dear Ms. Folsom:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 496255 (Houston GC #20527).

The Houston Fire Department (the "department") received a request for information regarding a named firefighter, specifically (1) any and all videos of the named firefighter's assessment on April 27, 2013, (2) any and all videos of other senior captain candidates who were assessed on April 27, 2013; (3) the names of the individuals who were responsible for the grading of the assessment video and any documentation reflecting the same; (4) a list of specific candidates who were assessed by each team; (5) the criteria that each team utilized in performing the assessment; (6) tools that were utilized to assure that each and every assessment grader and/or team were rendering same or similar scores for similar responses; and (7) any and all graded assessment sheets or notes used by the assessors in grading the named firefighter's assessment taken on April 27, 2013. You inform us the department has no information responsive to item 4 of this request.¹ You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.122 of the

¹We note that Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), 362 at 2 (1983).

Government Code. You also state release of a portion of the requested information may implicate the proprietary interests of Morris & McDaniel, Inc. ("Morris & McDaniel"). Accordingly, you notified Morris & McDaniel of the request and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also received and considered comments from the requestor's law firm. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.103 provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”).

You claim the information at issue is excepted from public disclosure under section 552.103 of the Government Code. You state that seven firefighters filed suit against the department in the United States District Court for the Southern District of Texas, Cause No. H-08-2404, *Dwight Bazile, et. al. v. City of Houston*, which resulted in a final judgment on March 29, 2013. You provide a court order showing the Houston Professional Fire Fighters Association (“HPFFA”) received an extension to file its notice of appeal on April 22, 2013. The court gave the HPFFA until May 29, 2013 to file its notice of appeal. Furthermore, you state the information at issue is related to this lawsuit. We note the instant request for information was received on May 20, 2013. Upon review, we find litigation was reasonably anticipated when the department received this request for information and the information at issue is related to the anticipated litigation for the purposes of section 552.103. Therefore, the department may withhold the information at issue under section 552.103 of the Government Code.³

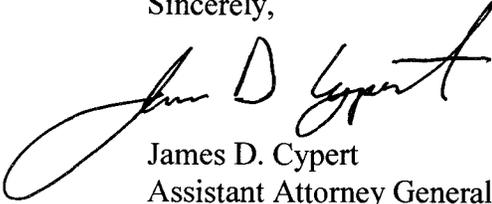
We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James D. Cypert
Assistant Attorney General
Open Records Division

JDC/tch

Ref: ID# 496255

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Judge Roger McMillin
Vice President of Operations
Morris & McDaniel
117 South Saint Asaph Street
Alexandria, Virginia 22314
(w/o enclosures)